APPENDIX "A"

Opinion of the United States District Court for the District of Oregon, issued April 14, 1960 (R. 46-67):

Kilkenny, J:

Defendants move to dismiss plaintiff's complaint and this action on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

Plaintiff is an unincorporated association of individuals, with its principal office and place of business in Portland, Oregon. It is a labor organization, with a membership of approximately 150 individuals, and represents those persons in an industry effecting commerce as defined in the Labor-Management Relations Act of 1947. Defendants are corporations organized under the laws of the State of Oregon engaged in the publication of daily newspapers in Portland. Defendants utilize substantial amounts of raw materials imported by them into the State of Oregon from other states in the union. They distribute their newspapers and other products in the states of California, Idaho, Washington and others. Such activities of defendants affect "commerce" within the meaning of the word as defined by the Labor-Management Relations Act of 1947.

Approximately 120 members of plaintiff were employed as pressroom employees of one or the other of defendants, or both. The employees performed services in the production of newspapers for defendants. The plaintiff was the exclusive representative of the employees of each of defendants for purposes of collective

bargaining with respect to wages, hours of work and other conditions of employment.

Effective January 1, 1958, plaintiff and defendants entered into a collective bargaining agreement governing wages, hours and working conditions of the pressroom employees of defendants, and each of them, said contract to expire on the 31st day of December, 1959. Under appropriate provisions of the agreement the parties commenced negotiations on September 28, 1959, for a new agreement and such negotiations continued until November 10, 1959, and thereafter as hereinafter recited. On November 10, 1959, Stereotypers Local Union No. 48 and the members thereof commenced a strike against each of defendants, and placed picket lines at the newspaper publishing plants of each of defendants, which picket lines have been continuously maintained by said union, and the members thereof, from the 10th day of November, 1959, to date. In said strike the said Stereotypers Union, and the members thereof, are making certain contentions. Plaintiff at all times after November 10, 1959, and until January 2, 1960, "unequivocally advised its members of its and their obligation not to strike and not to engage in work stoppages while the contract between the plaintiff and defendants remained in effect."

Notwithstanding such unequivocal advice, the individual members of the plaintiff who were and are pressroom employees of each of defendants declined to cross the picket lines maintained by the members of the Stereotypers Union and declined to report for or to perform their work in the production of the defend-

ants' newspapers from and after the 10th day of November, 1959, until the 2nd day of January, 1960, and the said individual members of plaintiff union previously employed by defendants at the time of the commencement of said strike continued to refuse to cross such picket lines and refused to work for defendants in defendants' plants behind such picket lines. From November 18, 1959, to the filing of the complaint, no representative of either of the defendants called or requested a meeting for the purpose of conducting further negotiations with reference to the terms of a new agreement to supplant or supersede the agreement which expired on the 2nd day of January, 1960. On December 27, 1959, the plaintiff addressed a communication to each of defendants advising of the fact that the old contract would expire on December 31, 1959, and demanding a meeting of representatives for the purpose of negotiating a new contract. On December 28, 1959, defendants directed a letter to plaintiff as follows:

"* * *

"On November 10, 1959, the Stereotypers' Union started a strike against the Oregonian and Journal publishing companies. Your union and its members failed and refused to honor the then existing agreement between the publishing companies and Portland Web Pressmen's Union No. 17. This failure and refusal occurred notwithstanding the fact that under the agreement your union and its members had pledged themselves not to strike.

"The refusal by the members of your union to comply with their obligations to the publishers and their

refusal to carry out the instructions given them by the publishers to perform their duties have continued without interruption since November 10, 1959. The pressmen who have failed to appear for work over this long extended period are no longer employees.

"With respect to meeting for the purpose of negotiating a new contract, we are ready to meet with you at any time you can establish that you represent a majority of our employees in an appropriate unit. * * * (signatures)."

After receipt of said letter, plaintiff addressed a night letter to said defendants, which reads as follows:

"This acknowledges on behalf of Portland Web Pressmen's Local 17 receipt late today of your letter of December 28, 1959, in which you take the position that pressroom employees governed, along with you, by our current agreement which remains in effect through December 31, 1959, are no longer employees of your two newspapers. Local 17 emphatically disagrees.

"If you had a grievance in this respect since November 10, you should have resorted to the settlement procedures provided for in our joint and effective agreement.

"Local 17 hereby refers the differences between the parties arising out of your said letter of December 28, 1959, to the Joint Standing Committee, and requests a meeting on these emergency issues forthwith. Certainly, there is no occasion for either the publishers of the union to take refuge in the 'within five days' provision to delay such a meeting beyond sometime on the 29th day of December, 1959.

"Our Standing Committee members stand ready to meet with the publisher members of the same committee upon the shortest telephone notice to the undersigned at or through CH 4-8359."

Neither of defendants responded to such night letter. On January 2, 1960, plaintiff declared itself and its members on strike against defendants, and each of them, under the claim that defendants had refused to bargain with the plaintiff as the exclusive representative of the pressroom employees of the defendants with reference to wages, hours and other conditions of work, and also to enforce plaintiff's proposals for a new contract to supplant and supersede the agreement between the parties. On January 4, 1960, plaintiff addressed another communication to defendants, the material portion of which reads as follows:

"* * *

"The undersigned, Union appointed members of the Joint Standing Committee, hereby call upon the newspaper appointees of the same committee to meet with them without further delay to deal with the above mentioned differences between the parties to the basic agreement. Those differences having arisen prior to January 1, 1960, and having been referred to the Joint Standing Committee prior to that date, the Union position is that the entire adjustment of differences procedures which are provided for in the basic agreement remain available and applicable to the parties, and obligatory upon them until the differences have reached final determination through utilization, and, if necessary, exhaustion of those procedures.

"The undersigned are ready to meet at your call upon any short but reasonable notice. You are earnestly requested to arrange a Joint Standing Committee meeting to handle these differences. Should you fail to arrange such a meeting to be held prior to Monday, January 11, 1960, the undersigned and the Union for its protection and the protection of its members will be obligated to take such legal actions as are indicated in the premises."

On January 11, 1960, defendants directed a communication to plaintiff, which reads as follows:

"The Oregonian and the Oregon Journal have received and given careful consideration to your letter of January 4 addressed to the attention of Messrs. Morrish and Haines, and do not agree with the positions you have taken. It therefore appears that no useful purpose would be served by complying with your request."

Plaintiff claims that a justiciable controversy exists between the plaintiff and the defendants and that the court has jurisdiction over the subject matter of the suit under the provisions of the Labor-Management Relations Act of 1947, 29 U.S.C.A. §185.

Among other provisions, the contract between the parties contains the following:

"Section 3(a). The Union is recognized as the collective bargaining agency for employes engaged in the operation of all web presses. * * *

* * *

"Section 4. A joint Standing Committee, composed of two representatives of the parties of the first part and two representatives of the party of the second part shall be appointed. * * * To this committee shall be referred all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof which cannot be settled otherwise. * * * The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract. * * *

"Section 5. It is agreed that fruitless controversies must be avoided, and every effort made to maintain good feeling and harmonious relations. To accomplish this both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation. Under all circumstances business shall be continued without interference or interruption in a regular and orderly manner, until the dispute is settled by the method set forth in Section 4 of this contract. * * *

* * *

"Section 20. The authority over the pressroom shall be vested in the Companies. Each Company will appoint one foreman to supervise the operation of its pressroom. The foreman shall at no time be considered to be a member of any operating crew and shall be a member of the Union. All working time belongs to the Companies and pressroom employes and crews shall perform any work pertaining to the Web Pressmen's trade which may be required of them by the foreman. Employes may not leave the office during working hours except

with permission of the foreman and no chapel meetings of any kind shall be held during working hours, except by general agreement between the chapel chairman and the foreman.

* * *

"Section 24. During the life of this agreement the party of the second part agrees not to strike and the parties of the second part agree not to lockout the party of the second part. The union reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lockout exists which has been authorized by the International Printing Pressmen's and Assistants' Union of North America." (Emphasis added.)

The above facts appear in the complaint. The relief sought by the plaintiff is dual in nature. First, the plaintiff demands declaratory relief in connection with the following problems:

(1) Did defendants have the right to terminate the employment of plaintiff's members.

(2) Are defendants required to invoke the procedures outlined in Section 4 of the contract.

(3) Are defendants obligated to participate in the procedures of Section 4 under the facts stated in the complaint.

(4) Does such obligation, if any, continue to exist. Second, plaintiff demands an injunction against defendants requiring the defendants to carry out the obligations, if any, declared to be binding upon defendants

1. Under the provisions of Title 28, U.S.C.A. §§1331 and 1332, the jurisdiction of a federal court cannot be invoked unless: (1) the controversy arises under the constitution, laws or treaties of the United States and involves $10,000; or (2) a controversy involving $10,000 arises between citizens of different states.

On oral argument counsel for the plaintiff conceded that independent federal jurisdiction was not conferred by either the United States Arbitration Act or the Federal Declaratory Judgments Act. It is plaintiff's contention that jurisdiction rests in the Federal courts until Title 29, U.S.C.A. §185, which provides:

"(a) Suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Said section confers jurisdiction upon the Federal courts to render a declaratory judgment on an existing contract. Kennametal, Inc., v. International Union, 161 F. Supp. 362 (D.C.W.D. Pa. 1958); Employing Plasterer's Association of Chicago v. Operative Plasterers, etc., 172 F. Supp. 337 (D.C.N.D. Ill., 1959). Said section extends jurisdiction in a proper case to actions for specific performance of an arbitration agreement. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Jurisdiction under the Declaratory Judgments Act has been consistently refused where the relief sought involves an expired union contract. Shank v. N.L.R.B.,

7 Cir., 1958, 260 F. 2d 444; Mackay v. Loew's, Incorporated, (D.C.S.D. Cal., 1949) 84 F. Supp. 676; Textile Workers Union v. Bates Mfg. Co., 158 F. Supp. 410, (D.C. Me., 1958).

We must now approach the question as to whether the complaint states sufficient facts to show a justiciable controversy. A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is abstract or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227; St. Pierre v. U.S., 319 U.S. 41.

The contract described in the complaint expired on December 31, 1959, and the complaint was not filed until January 15, 1960. I find nothing in the complaint which alleged any right in the plaintiff or its members which was vested during the term of the contract. It might be argued that the complaint shows a disagreement as to the employment status of the plaintiff's members as of December 28, 1959, when the plaintiff attempted to invoke the procedures provided by Section 4 of the contract. However, the plaintiffs had refused to work since November 10, 1959, and in my opinion, the members and the union had clearly violated the "No Work Stoppage" and "No Strike" provisions of the contract when the members refused to work on and subsequent

to November 10, 1959. The period of time from the date of demand on December 28, 1959 to December 31, 1959 is so minimal that the doctrine of "de minimis" should be applied. This doctrine has been recognized in the federal courts. Hunter v. Madison Avenue Corp., 6 Cir., 1949, 174 F. 2d 164, 167. The doctrine means that the law does not care for small things. Porter v. Rushing, 65 F. Supp. 759, 760. The doctrine means that the law does not bother with trifles. Dennison West 25th Street Implement Co. v. Great Atlantic & Pacific Tea Co., (Ohio App.) 69 N.E. 2d 79, 80.

Since, in any event, the ultimate relief which would be granted would be limited to determining the status during the last few days of the contract, the Court should not take jurisdiction.

Plaintiff's counsel attach great importance to the decision of the United States Supreme Court in Textile Workers Union v. Lincoln Mills of Alabama, supra. This case, in my opinion, supports the position of the defendants, rather than that of the plaintiff. The wage claims involved in the Lincoln case accrued during the life of the contract and these claims were vested rights on which the Court exercised its jurisdiction. The opinion went on to say that the matters which created no vested rights could not be considered. There is no claim in this case that wage or any other claim, other than the claim of the right to arbitrate, is involved.

Item Company v. New Orleans Newspaper Guild, 5 Cir., 1958, 256 F. 2d 855; Wilson Bros. v. Textile Workers Union, (D.C.S.D. N.Y., 1954) 132 F. Supp.

163; Local No. 250 v. Glendale Mfg. Co., (D.C.W.D. North Carolina, 1969) 179 F. Supp. 222; United Steel Workers v. New Park Mining Co., 10 Cir., 1959, 273 F. 2d 352, do not support the plaintiff's position. Accrued substantive rights were involved in each one of these cases. Furthermore, in United Steel Workers, the vital element of "unwillingness to work" was not present.

The language of the contract makes it absolutely clear that the parties intended to provide an orderly method for the settlement of disputes and that there would be no work stoppage or strike. Without question, the plaintiff understood that neither plaintiff nor its members had the right to stop work. The complaint alleges that the plaintiff unequivocally advised its members of its and their obligation not to strike and not to engage in work stoppages, while the contract between the parties remained in effect. The complaint also shows that notwithstanding the advice of the plaintiff, every member of the plaintiff declined to cross the picket lines maintained by the other union and refused to report for or perform their work in production of defendants' newspapers behind the picket line from November 10, 1959, until the expiration of the contract. I am of the opinion that the intention of the parties to the contract is clear and that it is unnecessary to invoke any of the rules of contractual construction. However, if we resort to well-known rules of construction, there can be no question of the intention of the parties in connection with the plaintiff's contractual obligations to continue with its work, irrespective of picket lines.

I shall state a few applicable rules of construction.

The law does not permit a contract to be remade by the Courts. Dermott v. Jones, 69 U.S. 1; Lowber v. Bangs, 69 U.S. 728; Gavinzel v. Crump, 89 U.S. 308; Pressed Steel Car Co. v. U.S., 157 F. Supp. 950, cert. den'd. 356 U.S. 967. In construing a contract, the court must examine all of its parts. Black v. United States, 91 U.S. 267; Cove Irrigation District v. American Surety Company, 9 Cir., 1930, 42 F. 2d 957, cert. den'd. 282 U.S. 891. A business contract must be construed with such business sense as it naturally would be understood by intelligent men of affairs. E. I. DuPont DeNemours & Co. v. Clairborne-Reno Co., 8 Cir., 1933, 64 F. 2d 224; Erie Railway Co. v. Ohio Public Service Co., 6 Cir., 1932, 62 F. 2d 83. It is clear that each of the parties, and in particular the plaintiff, construed this contract so as to require the members of the union to cross the picket line. Otherwise, the plaintiff would not have directed its members to continue work and cross the picket line. The practical construction or interpretation of a contract by the parties is entitled to great weight in determining its proper interpretation. Steinbach v. Stewart, 78 U.S. 566; City of Chicago v. Sheldon, 76 U.S. 50. The practical construction against interest, by a party to a contract, may constitute the strongest evidence of intent. Cutting v. Bryan, 9 Cir., 1929, 30 F. 2d 754, cert. den'd. 279 U.S. 860; U. S. v. Miller, 2 Cir., 1936, 81 F. 2d 8. As previously mentioned, the only exception to the no strike clause in the contract deals with a subject not here in controversy. Since only one exception is mentioner, the rule of expressio unius est exclusio alterius would be applicable and all exceptions not

mentioned would be excluded. United States v. Powelson, 4 Cir., 1941, 118 F. 2d 79, 88; 12 Am. Jur., Contracts, §239, p. 769. The Oregon Supreme Court applies the same rules of construction as the Federal Courts above mentioned. Biersdorf v. Putnam, 181 Or. 522, 182 P. 2d 992; Courteen Seed Co. v. Abraham, 129 Or. 427, 275 P. 684; Nunner v. Erickson, 151 Or. 575, 51 P. 2d 839; Dorsey v. Oregon-Washington Railroad & Navigation Co., 148 Or. 648, 38 P.2d 72; Kontz v. B. P. John Furniture Co., 167 Or. 187, 115 P. 2d 319; Markham, etc. v. International Woodworkers of America, etc., 170 Or. 517, 135 P. 25 727.

The failure of an employee to cross a picket line to perform his job violates the no strike provision of an agreement. NLRB v. Rockaway News Supply Co., 345 U.S. 71. The union must be held responsible for the mass action of its members. United States v. International Union, (Md. 1948) 77 F. Supp. 563, aff'd 177 F. 2d 29, cert. den'd, 338 U.S. 871; United States v. Brotherhood of Railroad Trainmen, etc., (N.D. Ill., 1951) 96 F. Supp. 478. Since the prevention of a strike is the chief advantage which an employer can reasonably expect from a collective bargaining agreement, the failure to cross the picket line was a material breach of the contract. United Electrical, Radio & Machine Workers v. NLRB, (1955) 223 F. 2d 338, cert. den'd 350 U.S. 981, rehearing den'd, 351 U.S. 915; Boeing Airplane Co. v. Machinists, etc., (D.C. Wash., 1950) 91 F. Supp. 596, aff'd 9 Cir., 1951, 188 F. 2d 356, cert. den'd 342 U.S. 821. The no strike clause is the very heart of a labor relations agreement. Boeing Airplane

Co. v. Machinists, etc., supra. The violation of the no strike clause destroys the union's right to compel arbitration. Cuneo Press v. Kokomo Paper, 7 Cir., 1956, 235 F. 2d 108, cert. den'd, 352 U.S. 912; W. L. Mead, Inc. v. International Brotherhood of Teamsters, etc., (U.S.D.C. Mass., 1955) 129 F. Supp. 313, aff'd 230 F. 2d 576, dism'd, 352 U.S. 802.

NLRB v. Knight Morely Corp., 6 Cir., 1958, 251 F. 2d 753, does not support the plaintiff's position. If anything, it supports defendants' contention that the National Labor Relations Board has jurisdiction over all questions in this case dealing with any right to reinstatement or further representation. In that case, the vested and accrued rights of 103 discharged employees were involved and such rights vested prior to the expiration of the contract.

From the history of the National Labor Relations Act and from the decisions rendered thereunder, it is manifest that the purpose of the Act was to establish a single paramount administrative or quasi-judicial authority to develop new federal law relating to collective bargaining and the only rights made enforceable by the Act are those determined by the Board to exist under the facts of each case. National Licorice Co. v. NLRB, 309 U.S. 350; Amazon Cotton Mill Co. v. Textile Workers Union, 4 Cir., 1948, 167 F. 2d 183.

The contract between the parties cannot be read without arriving at the conclusion that the plaintiff and the defendant desired to absolutely prevent work stoppages, strikes and production interruptions of all kinds

during the life of the contract. The contract specifically provides that the plaintiff should not strike and that defendants should not lock out the plaintiff. This intention is made doubly clear by the language of Section 20, which requires plaintiff and its members to do all work pertaining to their trade which may be required of them, and that the plaintiff's members should not leave the plant during working hours except with permission, and that no meetings of any kind should be held during working hours, except by special agreement. This intention is further buttressed by the language of Section 5 which requires that business shall be continued, under all circumstances, without interference or interruption in a regular and ordinary manner, until any dispute is settled by the method as set forth in Section 4 of the contract. The only reservation of a right to strike under the contract is set forth in Section 24 following the plaintiff's agreement not to strike where plaintiff reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lock out exists which had been authorized by the International Printing Pressmen's & Assistants' Union of North America. There is no claim by the plaintiff that any such strike existed in this dispute.

Without question, the obligation of the plaintiff and its members to continue work was required as one of the steps in the grievance procedure. Full performance of Section 5 of the contract is a requisite to a demand for performance under Section 4. Cuneo Press v. Kokomo Paper Handlers' Union, supra; Peoples v. Southern

Pacific Co., supra. The plaintiff cannot ignore the portion of the grievance procedure under which it is obligated and at the same time require performance by defendant of another requirement of the same procedure. Cuneo Press v. Kokomo Paper Handlers' Union, supra; Peoples v. Southern Pacific Co., supra; Textile Union Workers v. Lincoln Mills, supra.

To comment on each case cited by plaintiff would unduly lengthen this already protracted opinion. It is my considered judgment that plaintiff's cases are not in point. Armstrong-Norwalk Rubber Corp. v. Local Union #283, (Conn., 1958), 167 F. Supp. 817, does not support the plaintiff's position. In that case the employees were back at work when they sought to invoke the arbitration provision. The arbitration clause in that case contained no such provision as that contained in Section 5 of this contract. I do not pass on the legal question of whether the arbitrator, under the language of the instant case, should determine whether the issues in question were to be arbitrated. Since I have held that the agreement to arbitrate is not enforceable, the other question is moot. Tenney Engineering, Inc., v. United Electrical, Radio & Machine Workers of America, (D.C. N.J., 1959) 174 F. Supp. 878, app. dism'd, 2 Cir., 1959, 267 F. 2d 618, does not present the same set of facts as involved in the present case. In the Tenney case, the employer instituted an action for damages for breach of a no strike clause by the union. The court granted the stay pending arbitration. There was no continuing breach of the contract such as here. As in both the Signal-Stat case and the Armstrong case, the employees

were working at the time the action was commenced. In Signal-Stat Corp. v. Local #475, 2 Cir., 1956, 235 F. 2d 298, cert. den'd, 354 U.S. 911, reh. den'd, 355 U.S. 852, the union struck over a discharge grievance. The issue in that case was whether union liability and damages for breach of a no strike clause is an arbitrable issue. The only issue actually decided by the Court in Signal-Stat was whether the dispute of breach of a no strike clause was arbitrable under the particular arbitration clause. The court held that it was. No place in that decision did the Court have occasion to approach the question of whether a union which breaches both a no strike clause and the arbitration clause can itself enforce such clause. As a matter of fact, the members of the union in that case had returned to work, which element is entirely lacking in the present case.

In NLRB v. Rockaway News Supply, 345 U.S. 71, cited by plaintiff, the holding was that an individual employee's refusal to cross a picket line breached a no strike clause and that therefore, his employer's discharging him for such conduct did not violate the Labor Relations Act. The substance of the holding in that case was that the entire contract was not rendered void by an illegal clause and that the no strike clause was enforceable and was breached by the employee and that whether or not prior arbitration exists, the discharge of an employee under the Labor Management Relations Act is perfectly proper if he breaches a no strike clause. I do not believe that case has anything to do with the issue of whether arbitration is enforceable by a party which is in continuing violation of

the agreement, only a portion of which it seeks to enforce.

Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers, etc., supra, is readily distinguished from the case at bar. It is true that Tenney criticizes the decision in Cuneo and proceeds to use what I believe to be the same faulty reasoning which was used in the Armstrong case. In other works, the court compels arbitration on the issue of whether the union can compel arbitration. I am of the opinion that the better reasoned cases hold that the party in default and refusing to perform an essential part of the contract is in no position to insist on part performance of the portion of the contract which may be favorable to it. In any event, the factual situation was entirely different, in that the employees in the Tenney case had returned to work and there was no continuing breach as exists in the present case. In the Tenney case, the court holds that the arbitrator, and not the court, should determine whether the union was in default or could compel arbitration. This conclusion, in my opinion, is not sound. From the statement of facts in the present case, there would seem to be three disputes:

(a) that dispute which caused the strike which, like in Tenney, was a dispute with the Stereotypers union;

(b) the possible claim of the defendants against the plaintiff for damages for breach of contract, such as was made in Tenney; and

(c) the grievance of plaintiff concerning the employ-

er's position that the employee status of plaintiff's members was terminated.

Only the third dispute is involved in this case. That type of dispute was not involved in Tenney. Plaintiff is the one who should assert this grievance and did so by the letter of December 28, 1959. At that time, also unlike Tenney, plaintiff and its members were still on strike and in breach of the contract and such strike continued until after the expiration date of the contract. No such facts were involved in Tenney.

At first glance, Encinal Terminal (4 LRRM 117) would seem to support the plaintiff's position that the employees had no obligation to go through the picket line. However, the contract in that case was entirely different than the contract before this court. The contract in Encinal did not contain a no strike clause, but did contain a provision requiring submission of the union's disputes to the grievance committee. In the Encinal case, the court reasoned that "in the absence of an express agreement" the members of the union would not be required to pass through the picket line. There is an express no strike agreement in the contract before this court. I have already construed this contract to require the plaintiff and its members to pass through the picket line. Likewise, as previously pointed out, the plaintiff itself so construed the contract.

I conclude:

1. That plaintiff's complaint does not present facts showing a justiciable question which could be the basis of declaratory relief.

2. That the court has no jurisdiction over the subject of the suit. The rights of plaintiff, if any, which might exist would arise by reason of the Labor Relations Act and exclusive jurisdiction would be with the National Labor Relations Board.

Counsel for defendants may prepare, serve and present to the Court an appropriate judgment of dismissal.

APPENDIX "B"

Opinion of the United States Court of Appeals for the Ninth Circuit, entered December 19, 1960 (R. 78-88):

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17, an unincorporated association, *Appellant*,	)	
vs.	)	No. 16,892
	)	Dec. 19, 1960
OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY, corporations, and each of them, *Appellees*.	)	

Appeal from the United States District Court for the District of Oregon.

Before: HAMLEY, HAMLIN and JERTBERG, Circuit Judges. HAMLIN, Circuit Judge.

In March of 1958, the appellant, Portland Web Pressmen's Union, Local No. 17, hereinafter called the Pressmen, entered into a collective bargaining agreement with appellees, Oregonian Publishing Company and Journal Publishing Company, hereinafter called the Publishers. By its terms the contract was to run until December 31, 1959, and thereafter from year to year unless written notice of termination was given by either party. On or about September 28, 1959, the Pressmen gave notice that the agreement would be terminated. Therefore, the contract was to expire and did expire on December 31, 1959.

On November 10, 1959, the members of the Stereo-

typers Local Union No. 48, an association unconnected with the Pressmen, commenced a strike against the Publishers, and established picket lines at the Publishers' plants. Although the Pressmen advised its members not to strike or engage in any work stoppage, each and every member of the Pressmen refused to cross the picket line that had been established by the Stereotypers. Even the Pressmen's officials, who had advised the members not to participate in a work stoppage, refused to cross the picket lines. This situation continued until January 2, 1960, two days after the expiration of the collective bargaining agreement. On that date, the Pressmen officially called a strike against the Publishers.

Subsequent to the work stoppage on November 10th no action was taken by either party until December 27, 1959, when the correspondence that ultimately resulted in this suit commenced.

On December 27, four days before the contract was to expire, the Pressmen sent a letter to the Publishers requesting that the parties meet in order that a new contract be reached to replace the prior agreement which was to expire.[1] This letter makes no reference to ending

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[1] "Gentlemen:

Portland Web Pressmen's Local No. 17's agreement with your firms will expire on December 31, 1959. The only negotiating session to work out the terms of the new agreement was unproductive of even substantial progress, much less of a settlement.

With a view to arranging for more frequent meetings we attempted to reach you by the usual informal telephone method during the past week. These efforts terminated in an inconclusive telephone talk between Mr. Harold Bamberg, representing Local 17, and Mr. D. S. Haines, speaking for both publishers, in which Mr. Haines expressed serious doubts wether a meeting could be arranged, but undertook to advise Mr. Bamberg on this point.

the work stoppage, but merely states that the union seeks to negotiate for the purpose of consummating a new contract which would govern the parties for future years. On December 28, 1959, the Publishers replied to the Pressmen's letter as follows:

"Gentlemen:

On November 10, 1959, the Stereotypers' Union started a strike against the Oregonian and Journal publishing companies. Your union and its members refused to honor the then existing agreement between the publishing companies and Portland Web Pressmen's Union No. 17. This failure and refusal occurred notwithstanding the fact that under the agreement your union and its members had pledged themselves not to strike.

The refusal of the members of your union to comply with their obligations to the publishers and their refusal to carry out the instructions given them by the publishers to perform their duties have continued without interruption since November 10, 1959. The pressmen who have failed to appear for work over this long extended period are no longer employes.

With respect to meeting for the purpose of negotiating a new contract, we are ready to meet with you at any time you can establish that you represent a majority of our employes in an appropriate unit."

In answer to this letter, the representative of the union sent a night letter to each of the Publishers on December 28:

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* This is a more formal demand for a series of meetings to commence immediately and to continue at least through the next several days, looking to the reaching of agreement prior to expiration of our current agreement . . . .

Local 17 does not believe that the current existence of labor disputes with other labor organizations impairs or derogates from the obligations of both the publishers and this union to meet and treat in good faith with a view to settlement of our differences . . . ."

"Gentlemen:

This acknowledges on behalf of Portland Web Pressmen's Local 17 receipt late today of your letter of December 28, 1959, in which you take the position that pressroom employees governed, along with you, by our current agreement which remains in effect through December 31, 1959, are no longer employees of your two newspapers. Local 17 emphatically disagrees.

If you had a grievance in this respect since November 10 you should have resorted to the settlement procedures provided for in our joint and effective agreement.

Local 17 hereby refers the differences between the parties arising out of your said letter of December 28, 1959, to the Joint Standing Committee, and requests a meeting on these emergency issues forthwith. Certainly, there is no occasion for either the publishers or the union to take refuge in the 'within five days' provision to delay such a meeting beyond sometime on the 29th of December, 1959.

Our Standing Committee members stand ready to meet with the publisher members of the same committee upon the shortest telephone notice to the undersigned at or through CH 4-8359."

The Publishers did not respond to this letter. The contract expired on December 31, 1959; the Pressmen called a strike on January 2, 1960; and on January 4, the union representative again wrote and requested that there be a meeting of the joint standing committee in order that the dispute between the parties be settled. On January 11 the Publishers replied and refused to refer the matters to the committee, taking the position that no useful purpose could be served by compliance with the Pressmen's request. On January 15 the Press-

men filed this suit asking that the court compel the Publishers to submit the controversy to arbitration. The Publishers moved that the complaint be dismissed, and on April 14, 1960, the district court granted their motion. It held that the complaint does not present facts showing a justiciable controversy; that the dispute falls within the exclusive jurisdiction of the National Labor Relations Board; and that the breach of the "no strike agreement" deprives the Pressmen of the right to invoke the arbitration provisions. From that decision the Pressmen bring this appeal. This court has jurisdiction to hear the appeal under 28 U.S.C.A. § 1291.

Under § 301 of the Labor Management Relations Act, 29 U.S.C.A. 185, the federal courts are empowered to compel arbitration under collective bargaining agreements, provided that the movants establish a contractual right to arbitrate. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). It is therefore necessary to turn to the contract between the parties to see if it creates a legally enforceable duty to arbitrate the dispute presented here. The pertinent provisions of the contract between the Pressmen and the Publishers are contained in the following sections.

> Section 4. A joint Standing Committee, composed of two representatives of the parties of the first part and two representatives of the party of the second part shall be appointed, the members representing the parties of the first part shall be selected by the publishers and the members representing the party of the second part shall be selected by the union . . . . To this committee shall be referred all questions which may arise concerning the construction to be placed upon any clause of this con-

tract or alleged violation thereof which can not be setled otherwise . . . . The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract. The joint committee shall meet within five days, when any question of difference shall have been referred to it for decision by the executive officers of either party to this contract . . . .

Section 5. It is agreed that fruitless controversies must be avoided, and every effort made to maintain good feeling and harmonious relations. To accomplish this both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation. Under all circumstances business shall be continued without interference or interruption in a regular and orderly manner, until the dispute is settled by the method set forth in Section 4 of this contract.

* * * * *

Section 20. . . . Neglect of duty, violation of conspicuously posted Company rules or incompetency shall be grounds for discharge which may be appealed under the grievance procedure elsewhere provided in this contract . . . Discharged employes shall have no right to work as a substitute or regular unless reinstated by the foreman or by the joint standing committee. The Joint Standing Committee shall have authority to determine how, if any, back pay shall be awarded a reinstated employee.

* * * * *

Section 24. During the life of this agreement the party of the second part agrees not to strike and the parties of the first part agree not to lockout the party of the second part. The union reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lockout exists which has been authorized by the International Printing Pressmen's and Assistants' Union of North America.

We shall first consider the conclusion of the district court that plaintiff's complaint did not present facts showing a justiciable question which could be the basis of declaratory relief.

There is no claim that during the life of the contract anything occurred which entitled any of the individual members of Pressmen to compensation. They suffered no grievance during the life of the contract that is compensable in any way. Not a single member was willing or did report for work from the tenth of November, 1959, until after the filing of this action on January 15, 1960.[2] There is no dispute upon this point, for it is readily admitted by the Pressmen. No arbitrator could award back pay to men who were at all times unwilling to work and who actually did not work.

The sole issue that was in dispute between the Pressmen and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on strike should or should not be technically called employees between December 28 and December 31, 1959.

As is stated in *Aetna Life Insurance* v. *Haworth*, 300 U.S. 227 (1937) at 240:

> "A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska SS. Co.*, 253 U.S. 113, at

[2] The Pressmen were still on strike when this appeal was argued on November 1, 1960.

> 116. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [Citations omitted]

Whether the members of Pressmen in this case technically were or were not employees during the brief period in question was of no substantial importance under the contract. It was an "abstract" and "hypothetical" question. If an arbitration committee had made a finding either way, no order that it could have made would have altered the rights or remedies of either party under the contract. We agree with the district court that the complaint presented no facts showing a justiciable question which could be the basis of declaratory relief.

We likewise agree with the district court that any rights which appellant Pressmen might claim would arise under the National Labor Relations Act and that exclusive jurisdiction would be with the National Labor Relations Board.

By the letter of December 27, 1959, the Pressmen state that the only matter with which they are concerned is the right to act as the bargaining agent of the plant workers.[3] The Pressmen raised the question of the status of the employees only after they had received the Publishers' answer. The right that they are seeking to assert is not the right of the individual workers to return to work or to be awarded back pay. They are seeking the right to bargain collectively with the publishers as

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[3] See footnote No. 1.

exclusive representative of the pressroom employees of the publishers.

In this regard it is interesting to note the union's own statement of the reason that a strike was called on January 2, 1960. Paragraph 15 of the union's complaint in this action reads:

> "On the 2nd day of January, 1960, plaintiff declared itself and its members on strike against the defendants, and each of them, in protest against the refusal of defendants, and each of them, to bargain collectively with plaintiff as exclusive representative of the pressroom employees of defendants, and each of them, with respect to their wages, hours, and other conditions of work, and also to enforce plaintiff's proposals for a new contract to supplant and supersede the agreement between the parties, which is Exhibit A of this Complaint, and in resistance to the counter-proposals of defendants, and each of them, for a new agreement to supplant and supersede the agreement between the parties, which is Exhibit A to this Complaint."

This statement demonstrates that two days after the expiration of the old contract, the union was not concerned with the rights of the individual members of the union but was rather concerned with the failure of the Publishers to recognize the union as the bargaining representative of the pressroom workers.

Whether the Pressmen represented the employees of the Publishers and whether the Pressmen was the proper bargaining agent for the Publishers to deal with in negotiating a new contract, are questions that the N.L.R.B can properly determine. In fact, the parties could not by private agreement take away from the Board the right to make those determinations

If the Publishers refuse to bargain collectively with the representative of its employees, it is guilty of an unfair labor practice.[4] If the Publishers are guilty of any unfair labor practice, the Board has power to intervene and correct the abuses.[5] "The N.L.R.B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice." *Teamsters Union* v. *New York, N. H. & H. RR.*, 350 U.S. 155 (1956) at 160.

In *Amazon Cotton Mill Co.* v. *Textile Workers' Union*, an action brought by the union to compel the employer to bargain (the members of the union being on strike), the district court issued an interlocutory injunction requiring the employer to bargain with the union. The Court of Appeals reversed, saying:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative quasi-judicial authority in connection with the development of federal American law regarding collective bargaining': that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."[6]

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[4] "It shall be an unfair labor practice for an employer * * * (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C.A. § 158(a)(5).

[5] "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." 29 U.S.C.A. § 160(a).

[6] *Amazon Cotton Mill Co.* v. *Textile Workers' Union*, 167 F.2d 183 (4 Cir. 1948) at 186.

In *Textile Workers' Union* v. *Arista Mills Co.*, 193 F.2d 529 (4 Cir. 1951), the same court of appeals affirmed the doctrine stated in *Amazon Cotton*, and quoted with approval the following statement made by Chief Judge Jones in *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949):

> "It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board. . . . If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only a breach of contract but also an unfair labor practice."

The facts of the *Reed* case clearly involved the meaning of language that had been used in a contract betweeen the employer and the union and involved substantial rights of the parties. In the case presently under consideration, we have pointed out that no substantial rights of the employees under the contract were involved, and no question is raised concerning the interpretation to be placed on the contract been the parties which expired on December 31, 1959.

Mr. Justice Frankfurter had occasion to discuss the jurisdiction of the N.L.R.B. in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). He said, at page 244

> "When it is clear or may fairly be assumed that

> the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.
> * * *
>
> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

We believe that where the question between the parties is whether one or the other has been guilty of an unfair labor practice and there are no substantial contract violations involved (and we have found none here) that the exclusive jurisdiction for the settlement of such a dispute should rest with the N.L.R.B.

Nowhere in the record before this court is there any evidence that the individual members of the union have suffered because of the letter written by the Publishers, except to the extent that the Publishers questioned whether the Pressmen represented a majority of their employees. This controversy is specifically covered by the Labor Management Relations Act, 29 U.S.C.A. § 158(a)(5). The only right that the individuals have been denied, if in fact there has been a denial, is a right that has been created for them by statute, the right to have their union bargain collectively for them. The statute that grants the right also establishes the procedure that must be used to enforce the right. The place for them to seek relief is through the N.L.R.B.

Counsel for the Pressmen rely upon three Supreme Court cases decided June 20, 1960. *United Steel Workers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steel Workers of America* v. *Enterprise Corporation*, 363 U.S. 593. We do not think that any of these three is in point. In each case the facts showed that the union contended that its members had suffered substantial grievances during the time that the contracts were in effect. In each, if the arbitrator had found that the action of the employer was wrongful, the individual members of the union who were affected by the wrongful action would have been entitled to some compensation. The rights of these individual members were vested in them during the period covered by the contract. As we have pointed out, such facts are not present in this case. The only complaint that the Pressmen make is that the Publishers refused to engage in collective bargaining with it as the representative of its members. There is no claim made that any of the union members would be entitled to any substantial redress even if the arbitrator decided every that was submitted to him in favor of the Pressmen. Settlement of this dispute can only be had by resort to the N.L.R.B. To hold otherwise would be to hold that by a collective bargaining contract the parties are able to take disputes that Congress has consigned to the exclusive jurisdiction of the N.L.R.B. out of the hands of the N.L.R.B. and put them in the hands of a private arbitrator.

Counsel for the Publishers contended in the district

court and in this court that the violation of the no-strike agreement by the members of the Pressmen deprived the union of the right to invoke the arbitration clause of the contrast. In view of our decision and holding as above set out, it is not necessary for us to reach this question, and we expressly decline to pass upon this contention of the Publishers.

Judgment affirmed.

(Endorsed) Opinion Filed Dec. 19, 1960.

Frank H. Schmid, Clerk.

APPENDIX "C"

Judgment of the United States Court of Appeals for the Ninth Circuit entered December 19, 1960 (R. 89):

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: December 19, 1960
FRANK H. SCHMID, *Clerk*

IL

In the Supreme Court

[illegible]

BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 827

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,

Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY,

Respondents.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 78-88) is reported at 286 F.2d 4. The opinion of the District Court (Tr. 46-67) is reported at 188 F. Supp. 859.

JURISDICTION

As will be stated more fully below, petitioner either misconceives or misstates both the essential character of this case and the decision rendered by the court below. So also petitioner errs in its assertion that the decision of the Court of Appeals is in conflict with principles recently announced by this Court and with decisions of the Third, Fourth, Fifth and Tenth Circuits.

Consequently, as will be shown, petitioner's invocation of jurisdiction under 28 U.S.C. § 1254 (1) (1952) is not warranted in this case.

QUESTION PRESENTED

This case involves only a dispute concerning petitioner's continuing status as the exclusive bargaining representative of the pressroom employees of respondents. Petitioner seeks to compel the arbitration of this dispute. Consequently, contrary to petitioner's statement, the sole issue involved in this case is whether a federal court acting under Section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a) (1952)) may compel the arbitration of a dispute as to whether a union represents a majority of the employees in a given unit, in this case, the pressroom.

STATUTES INVOLVED

Those pertinent portions of the National Labor Relations Act (49 Stat. 449 (1935), as amended. 29 U.S.C. § 151 (1952)) and the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141 (1952)), which are not set forth in petitioner's brief (Pet. Br. 2-3) are contained in Appendix "A" to this brief.

STATEMENT OF THE CASE

The pertinent facts alleged in the complaint are:

1. On September 28, 1959, petitioner reopened the agreement between itself and the respondents (Tr. 5),

and a month later respondents submitted their counter-proposals (Tr. 6):

2. Commencing November 10, 1959, petitioner's members unanimously refused to work for respondents, which refusal continued until January 2, 1960, when petitioner declared itself on strike against respondents (Tr. 7, 10), and still continued when this action was filed on January 15, 1960 (Tr. 83).

3. On December 27, 1959, petitioner demanded that respondents meet and bargain over the terms of a new agreement to replace the one expiring by its terms on December 31, 1959 (Tr. 36-37):

4. On December 28, 1959, respondents rejected this demand, stating in explanation that petitioner's members were no longer employees, but expressing the willingness of respondents to meet with petitioner at any time petitioner could demonstrate that it represented a majority in an appropriate unit (Tr. 38-39):

5. Later the same day petitioner characterized this refusal as a "grievance" and attempted to submit it to the procedures provided by the contract (Tr. 40-41):

6. On January 2, 1960, petitioner declared itself on strike "in protest against the refusal of (respondents) to bargain collectively with (it) as the exclusive representative of the pressroom employees" (Tr. 10).

The allegations of plaintiff's complaint itself show that because of the failure of petitioner and its members to comply with the requirements of § 8(d) of the Labor Management Relations Act (29 U.S.C. § 158(d) (1952))

they were no longer "employees" for purposes of determining petitioner's right to continued recognition as the exclusive bargaining agent of the pressroom employees. However, the merits of respondents' position in this regard are not, of course, in issue here. The important point to be noted is that the alleged dispute over the discharge of employees which petitioner seeks to invoke is a phantom issue. The occasion for any such dispute never arose since petitioner's members, without exception, had continuously refused to report for work during the period in question here. The only dispute which ever did arise involved the technical status of these individuals only incidentally and for the sole purpose of determining whether petitioner represented a majority in the appropriate unit.

Of course, the court below readily discerned that upon the record, the only right with which petitioner was concerned was its own right to act as the bargaining agent of the pressroom employees (Tr. 84, 87). As to petitioner's members, the court below held that any question as to their technical status related not to any substantive rights arising under the contract but to the right of petitioner to continued recognition as their exclusive bargaining representative (Tr. 83-84, 87). The court below held that the determination of this question cannot depend upon private contract, but resides instead within the exclusive jurisdiction of the National Labor Relations Board (Tr. 84-85, 88). It is this decision which petitioner asks this Court to review.

ARGUMENT

Illustrative of petitioner's apparent failure to grasp the fundamental nature of this case are two questions which petitioner asserts are presented here. In summary, petitioner first poses the question of whether a court may refuse to compel the arbitration of a grievance arising under the contract because the court finds that an arbitrator could afford no "specific relief of a substantial character" (Pet. Br. 2). The second question posed by petitioner is whether the availability of a remedy under the National Labor Relations Act for conduct which constitutes a breach of contract deprives the courts of jurisdiction over that same conduct (Pet. Br. 2). Neither of these questions is presented either by the record or by the decision of the court below.

It seems apparent that both of petitioner's questions can only result from a misunderstanding of the essential character of this case as well as a misapprehension of the decision below. For neither question is relevant in the absence of that which is manifestly lacking here: a claim which on its face the parties have agreed to arbitrate, i.e. here, in the words of petitioner's two questions, a "grievance involving the construction or violation of the collective bargaining agreement," or "conduct which constitutes a breach of contract" (Pet. Br. 2).

The complete absence here of any dispute arising under the contract is illustrated by summarizing the sequence of events presented by the record: (1) a demand for bargaining by petitioner; (2) a refusal by re-

spondents to recognize and bargain with petitioner accompanied by a statement as to the employee status of petitioner's members who had chosen not to report for work since November 10, 1959 (Tr. 38, 7); (3) a strike initiated, in the words of the complaint, "in protest against the refusal of the (respondents) . . . to bargain collectively with (petitioner) as exclusive representative of the pressroom employees . . ." (Tr. 10); (4) a formal demand by petitioner and refusal by respondents to arbitrate this matter (Tr. 38-39, 44).

As held by the court below, it is this refusal of respondents to continue the recognition of petitioner as exclusive representative of the pressroom employees which constitutes the fundamental dispute between the parties here. As held by the court below, the matter of petitioner's representative status nowhere appears upon the face of the contract, and, indeed, the parties could not by private contract have undertaken to resolve questions of representation which Congress has chosen to repose with the National Labor Relations Board (29 U.S.C. § 159 (1952)) (Tr. 85).

Thus, it seems apparent that petitioner has somehow overlooked or forgotten the fact that this dispute involves only the question of its continuing representative status, a question which relates to possible statutory rights and procedural remedies, not to the construction or violation of the contract. Consequently, the subject matter of this dispute patently is not such as involves a grievance arising upon the face of the contract, and for that reason, is not a dispute such as the parties

have agreed to submit to the grievance procedure and to arbitration.

It is in this context that the court below held that the status of petitioner's members during the period in question is "of no substantial importance under the contract" (Tr. 83), and that the only conceivable right, if any, denied petitioner's members is a wholly statutory right, "the right to have their union bargain collectively for them" (Tr. 87). Of course, as pointed out by the court below, the procedures available for the enforcement of any such right are likewise statutory and not contractual in nature (Tr. 87). Therefore, it is evident on the record that the dispute over petitioner's representative status involved here does not raise questions which relate to the function of arbitrators in the declaration of contractual rights and the formulation of contractual remedies or to the jurisdiction of the courts to enforce the arbitration of such contractual matters.

Petitioner advances two principal arguments in support of its contention that a writ of certiorari should be granted in this case. As is the case of the two questions framed by petitioner, both arguments rest upon the assumption that this case involves a dispute which on its face arises under the contract. This assumption simply is not supported on the record.

Petitioner's first argument advances the proposition that the court below failed to follow the principles laid down by this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 547; and *United Steel-*